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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1869

PETER H. BEER, *et al.*,

Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

and

JOHNNY JACKSON, JR., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES JOHNNY JACKSON, JR., *ET AL.*

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INDEX

PAGE

Questions Presented 1

Summary of Argument 2

Argument 3

I. Plan II Would Have the Effect of Denying or Abridging the Right to Vote on Account of Race or Color 5

1. The Legal Standards 5

2. The Effect of Plan II 14

II. Plaintiffs Failed to Prove That Plan II Did Not Have the Purpose of Denying or Abridging the Right to Vote on Account of Race 22

Conclusion 27

Table of Authorities:

Cases:

Allen v. Board of Elections, 393 U.S. 544 (1968) 4

Anderson v. Martin, 375 U.S. 399 (1964) 20

Burnette v. Davis, 382 U.S. 42 (1965) 7

Brown v. Board of Education, 347 U.S. 483 (1954) 14

City of Petersburg v. United States, 410 U.S. 962 (1973) 13, 21

Connor v. Johnson, 11 Race Rel. Rep. 1859 (S.D. Miss. 1966) 8

PAGE

Connor v. Johnson, 265 F. Supp. 492 (S.D. Miss. 1967) 8

Fortson v. Dorsey, 379 U.S. 433 (1965) 7

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 7

Katzenbach v. Morgan, 384 U.S. 641 (1966) 11
Kilgarlin v. Hill, 386 U.S. 120 (1967) 7

Perkins v. Matthews, 400 U.S. 379 (1971) 8, 9, 10

Reynolds v. Sims, 377 U.S. 533 (1964) 19

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 4, 11

Taylor v. McKeithen, 499 F.2d 893 (5th Cir. 1974) 12

United States v. Association of Citizens Councils of Louisiana, 187 F. Supp. 846 (W.D. La. 1960) 15
United States v. Georgia, 411 U.S. 526 (1973) 10, 21
United States v. Louisiana, 380 U.S. 145 (1965) 15
United States v. McElveen, 177 F. Supp. 355 (E.D. La. 1960) 15

Whitcomb v. Chavis, 403 U.S. 124 (1974) 7, 22
White v. Regester, 412 U.S. 755 (1973) 11
Wright v. Council of City of Emporia, 407 U.S. 451 (1972) 13
Wright v. Rockefeller, 375 U.S. 52 (1964) 7, 12

Statutes and Constitutional Provisions:

United States Constitution, Fourteenth Amendment 11

United States Constitution, Fifteenth Amendment ..3, 11, 21

PAGE

42 U.S.C. § 1973b (Section 4 of the Voting Rights Act) 3

42 U.S.C. § 1973c (Section 5 of the Voting Rights Act) .....*passim*

La. Rev. Stat., Art. 18, § 358 20

Legislative Materials:

115 Cong. Rec. (1969) 7

116 Cong. Rec. (1970) 6, 7

Hearings Before a Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., (1975) 11

Hearings Before the Subcommittee on Constitutional Rights of The Senate Committee on the Judiciary on Bills to Amend the Voting Rights Act, 91st Cong., 1st and 2d Sess., (1969-70) 7, 8, 9, 21

Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 4249, 91st Cong., 1st Sess. (1969) 6, 8

Official Journal of the Constitutional Convention of the State of Louisiana, 1898 14

Other Authorities:

United States Commission on Civil Rights, The Voting Rights Act: Ten Years After (1975) 9, 10, 11, 15

United States Commission on Civil Rights, Political Participation (1968) 5, 6, 7, 8, 15

PAGE

1961 United States Commission on Civil Rights Report:
Voting 14, 15

Hearings in Louisiana Before the U.S. Commission on
Civil Rights 14

David H. Hunter, Federal Review of Voting Charges:
How to Use Section 5 of the Voting Rights Act,
(1974) 9

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Questions Presented

1. Did plaintiffs prove that Plan II will not have the effect of denying or abridging the right to vote on account of race or color?

2. Did plaintiffs prove that Plan II did not have the purpose of denying or abridging the right to vote on account of race or color?

Summary of Argument

I. 1. Section 5 of the Voting Rights Act was adopted to prevent states and subdivisions with a history of discrimination in voting from devising new schemes to disenfranchise minority voters. Section 5 was applied to redistricting laws because ordinary constitutional challenges had proved ineffective in preventing the dilution of black voting strength. Congress was concerned in particular to forbid through section 5 the implementation of districting plans which divided concentrations of black voters among several predominantly white districts. Such plans are impermissible under section 5 regardless of whether they have a "rational basis."

2. Plan II is precisely the type of districting plan which section 5 was intended to prevent. The District Court correctly concluded that black voters in New Orleans were concentrated in an east-west belt. Plan II systematically divided that black concentration among five different city council districts with substantial numbers of white voters. The adverse effect of this division on black voters was aggravated by the pattern of bloc voting along racial lines in New Orleans.

II. Plaintiffs failed to establish that Plan II was a good faith effort to correct the undisputed defects in Plan I. Plan II was prepared before the Attorney General objected to Plan I, and necessarily failed to take into account the nature of those objections. Plan II was fashioned to solve problems regarding the predominantly white Algiers section, and its effect on the fragmentation of the black community was both incidental and largely insignificant. Since Plan II was enacted by city councilmen with a vested interest in diluting the voting strength of the black community, and since Plan II had precisely that effect, the conclusion is inescapable that such dilution was the purpose of Plan II.

Argument

In 1965, after extensive hearings and debate, and in the face of evidence that less drastic measures had proved ineffective, Congress adopted the Federal Voting Rights Act. The Act implemented Congress' firm intention to rid the country of racial discrimination in voting, and provided stringent new remedies against those practices which had most frequently denied citizens the right to vote on the basis of race. The Act suspended for five (now ten) years the use of certain "tests and devices" which Congress believed had been adopted or administered so as to discriminate on the basis of race. 42 U.S.C. §1937b. Although none of these tests or devices were unconstitutional *per se*, this Court upheld the suspension as within the power of Congress under section 2 of the Fifteenth Amendment. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 333-34 (1966).

Congress was further concerned, however, that the mere suspension of existing tests would not prove sufficient to end the problems of discrimination that had existed for decades in the covered states such as Louisiana. Some of those states had in the past shown extraordinary ingenuity in contriving new laws and procedures to perpetuate voting discrimination, and Congress had reason to fear that those states might resort to similar maneuvers in the future. Under the compulsion of these unique circumstances, and unable to foresee every discriminatory contrivance which might in the future be concocted, Congress adopted section 5 of the Act. Section 5 requires that, prior to implementing any "voting qualification or prerequisite to voting, or

standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964," the State or subdivision involved must obtain a declaratory judgment in the United States District Court for the District of Columbia that the new practice "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. §1973c. Section 5 also establishes an alternative and more expeditious procedure for obtaining approval of the new law; the new law may be enforced if it is submitted to the Attorney General of the United States and, within 60 days of the submission, the Attorney General does not formally object to the new statute or regulation. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966); *Allen* v. *Board of Elections*, 393 U.S. 544, 548-49 (1968).

The subject of the instant action is Ordinance No. 5154 (hereinafter referred to as "Plan II"), which redistricts the City Council of the City of New Orleans. Plaintiffs submitted Plan II to the Attorney General in May, 1973; on July 9, 1973, the Attorney General interposed an objection to Plan II on the ground that plaintiffs had failed to establish that the plan would not have the effect of discriminating on the basis of race.[1] Thereafter plaintiffs commenced this action in the United States District Court for the District of Columbia, seeking a declaratory judgment that Plan II did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color. On March 15, 1974, the District Court concluded that Plan II would have such a discriminatory effect, and denied the declaratory judgment.[2] Having resolved the case on this basis, the District Court did not reach the question of whether Plan II also had a discriminatory purpose.[3]

[1] Appendix, pp. 33-35.

[2] Jurisdictional Statement, pp. 1a-74a.

I.

Plan II Would Have the Effect of Denying or Abridging the Right to Vote On Account of Race or Color.

1. The Legal Standards

The legislative history of section 5, particularly in connection with the renewal of the Voting Rights Act in 1970, makes clear the type of reapportionment with which Congress was concerned and which Congress adopted section 5 to stop—the division of a concentration of black voters among several districts in which the black voters were combined with a larger number of white voters. In 1968 the United States Civil Rights Commission reported to Congress that district lines were being drawn in this way in southern states to dilute the newly gained voting strength of Negroes.[4] In Alabama state legislative districts had been fashioned so that they "aggregated predominantly Negro counties with predominantly white counties," thus "preventing election of Negroes to House membership." In Mississippi the congressional district lines were drawn to divide the predominantly black Delta region among three districts with white majorities.[5] Senate and House seats were also redrawn in Mississippi.

> In several instances, the legislature combined counties in which Negroes constituted a majority of the population and a majority of the registered voters in legis-

[3] Jurisdictional Statement, pp. 40a-42a.

[4] United States Commission on Civil Rights, Political Participation, p. 177 (1968).

[5] *Id.*, p. 31.

> lative districts with counties having white population and voting majorities. For example, majority Negro Claiborne County was joined in a senatorial district with majority white Hinds County. Jefferson County, with a 70 percent Negro population and a Negro voting majority, was combined with Lincoln County, which has a population 69 percent white. In both cases the resulting district had a majority white population.[6]

The results of this 18 month Civil Rights Commission study were among the factors that induced Congress in 1970 to extend the Voting Rights Act. See 116 Cong. Rec. 5521, 5526 (1970).

Concern with this problem was voiced throughout the legislative process in 1970. At the House hearings Mr. Glickstein of the Civil Rights Commission testified,

> The history of white domination in the South has been one of adaptiveness, and the passage of the Voting Rights Act and the increased black registration that followed has resulted in new methods to maintain white control of the political process. . . .
>
> For example, State legislatures [have redrawn] the lines of districts to divide concentrations of Negro voting strength.[7]

Congressman McCulloch expressed a similar concern with the alteration of district lines.[8] During the Senate hearings Mrs. Freeman testified for the Commission that legislatures had done what they could to make black votes "worth little" by drawing "lines of legislative districts

[6] *Id.*, p. 34-35.

[7] Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 4249, 91st Cong., 1st Sess., p. 17 (1969).

[8] *Id.*, p. 3.

to divide concentrations of Negro voting strength." [9] Other witnesses testified to the use of this device as well as related practices such as use of multi-member districts.[10] During the House and Senate debates repeated concern was expressed that the value of minority votes would be diluted by submerging them in districts with white majorities.[11]

The need to apply section 5 to reapportionment cases was particularly great because, as the Civil Rights Commission pointed out, constitutional attacks on these efforts to dilute black votes had been largely unsuccessful.[12] Although this Court held open the possibility that multimember districts might not be invulnerable to judicial scrutiny, this Court rejected all such challenges prior to 1973. See *Whitcomb* v. *Chavis*, 403 U.S. 124 (1974); *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967); *Fortson* v. *Dorsey*, 379 U.S. 433 (1965). A similar device, the annexation of white suburbs to a city with a large minority population, was upheld in *Burnette* v. *Davis*, 382 U.S. 42 (1965), *affirming Mann* v. *Davis*, 245 F. Supp. 241 (E.D. Va. 1965). The possibility of a judicial challenge to gerrymandering of district lines, first raised in this Court in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), was complicated if not dimmed by a later decision laying great emphasis on proof of discriminatory motives. *Wright* v. *Rockefeller*, 376 U.S. 52 (1964).

[9] Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Bills to Amend the Voting Rights Act, 91st Cong., 1st and 2d Sess., p. 47 (1969-70).

[10] *Id.*, pp. 195-96, 469 (Efforts to frustrate the Act include "redistricting to nullify local black majorities.")

[11] 115 Cong. Rec. 38486 (Remarks of Rep. McCulloch); 116 Cong. Rec. 5520-21 (Remarks of Senator Scott), 5527 (Remarks of Senator Scott), 6168 (Remarks of Senator Scott), 6358 (Remarks of Senator Bayh) (1970).

[12] Political Participation, p. 35, n.63.

The Commission noted with particular concern the judicial treatment of constitutional challenges to certain Mississippi redistricting which the Commission believed was adopted for the express purpose of diluting black votes and evading the Voting Rights Act. The challenge to the gerrymandering of congressional lines was summarily rejected on the ground that the black plaintiffs had to prove discriminatory purpose, and could not do so merely by offering newspaper reports of statements made by the relevant legislators. *Connor* v. *Johnson*, 11 Race Rel. Rep. 1859, 1863 (S.D. Miss. 1966). A challenge to the gerrymandered legislative districts was summarily rejected when the district court refused to even consider the racial composition of the new districts. *Connor* v. *Johnson*, 265 F. Supp. 492, 498-99 (S.D. Miss. 1967), *aff'd* 386 U.S. 483 (1967). Although all of these districting changes had survived constitutional challenges, none had ever been submitted for approval under section 5. The Commission called on the Attorney General to take steps, especially with regard to Mississippi, to enforce section 5 as it applied, *inter alia*, to changes in election districts.[13] During the 1969-70 hearings on renewal of the Voting Rights Act, the Attorney General repeatedly testified that a ban on any discriminatory "purpose or effect" was broader than the unelaborated constitutional prohibition.[14] The Assistant Attorney General in charge of the Civil Rights Division told the Senate Committee, "[T]he real innovation about section 5 . . . was that it contained language that changes with discrimi-

[13] Political Participation, p. 184. The failure of the Attorney General to take steps to enforce section 5 in similar circumstances was discussed in *Perkins* v. *Matthews*, 400 U.S. 379 (1971).

[14] Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 4249, 91st Cong., 1st Sess., p. 280 (1969); Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Bills to Amend the Voting Rights Act, 91st Cong., 1st and 2d Sess., pp. 189-190 (1969-70).

natory effect were in violation of the law. Most of us used to assume, and the courts, I think, pretty well held, that if you were to attack a State law as being in violation of the 15th Amendment, you would need to prove that there was a discriminatory legislative purpose."[15] Thus the Commission concluded that the application of section 5 was necessary to stop redistricting practices which could not be dealt with effectively through ordinary litigation.

In the years immediately preceding and following the enactment of the Voting Rights Act, the principle tactics used to prevent black participation in the political process were direct obstacles to registration and voting. More recently, however, the fashioning of district lines and multimember districts to dilute the effectiveness of minority votes have become the "prime weapons" of those seeking to frustrate the purposes of the Act. *Perkins* v. *Matthews*, 400 U.S. 379 (1971). In January, 1975, the Civil Rights Commission reported that

> The most serious problem for minority voters now is practices which dilute the minority vote. The greatest use of section 5 has been in preventing such practices.[16]

Between 1971 and 1974 the Attorney General interposed objections to 51 different redistricting plans in six states involving congressional, legislative, county supervisors, police jury, school board, parish council, and city council districts.[17] In objecting to these plans under Section 5 the

[15] Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Bills to Amend the Voting Rights Act, 91st Cong., 1st and 2d Sess., p. 507 (1969-70).

[16] The Voting Rights Act: Ten Years After, p. 345.

[17] *Id.*, pp. 400-409; David H. Hunter, Federal Review of Voting Charges: How to Use Section 5 of the Voting Rights Act, pp. 90-97 (1974).

Attorney General used the same standard applied in the instant case—that district lines must not be drawn in such a way as to divide up a concentration of minority voters and submerge the fragments of that concentration in districts with larger numbers of white voters.[18]

This construction of Section 5, fashioned by the Attorney General in a series of cases to assure that districting plans would not have a discriminatory effect, should be accorded the deference due "to the interpretation given the statute by the officers or agency charged with its administration." *Perkins* v. *Matthews*, 400 U.S. 379, 391 (1971). Such deference is particularly appropriate in the instant case, since Congress is at this very moment considering a ten year extension of the Voting Rights Act so as to apply the estab-

[18] United States Commission on Civil Rights, the Voting Rights Act: Ten Years After, pp. 204-327 (1975).

In opposing the district lines which were the subject of *United States* v. *Georgia*, 411 U.S. 526 (1973), the Attorney General noted that eight Georgia counties "form a contiguous group—of 89,626 persons, of whom 57.2 percent are nonwhite—enough to form at least three new majority-nonwhite single-member districts. Yet the submitted plan has only one district in the area with a slight nonwhite population majority (50.56 percent)—new District 59. The other new districts (60, 63, 64, 76 and 78) are 'border districts' partly inside and partly outside the majority-nonwhite area and have significant, but minority, nonwhite population percentages. These demographic facts . . . do not permit us to conclude, as we must under the Voting Rights Act, that this plan does not have a discriminatory racial effect on voting". Appendix, No. 72-75, pp. 11-12.

In 1971 the Attorney General opposed the lines defining the supervisors' districts in Yazoo County, Mississippi because "the district boundary lines within the City of Yazoo unnecessarily divide the black residential areas into each of the five districts." Letter of David Norman to Griffin Norquist, July 19, 1971, annexed to Brief Amicus Curiae of the NAACP in *United States* v. *Georgia*, No. 72-75, p. A-3. See also Letter of David Norman to Jack P. F. Gremillion, August 20, 1971, pp. A-5 to A-10; Letter of David Norman to Thomas Watkins, July 14, 1971, pp. A-13 to A-15.

lished standards to the redistricting that will follow the 1980 census.[19]

Plaintiffs suggest that the District Court was obligated to uphold Plan II unless it affirmatively concluded that that plan violated the Fourteenth or Fifteenth Amendment. But Section 5 neither requires nor entails such a constitutional inquiry. In adopting Section 5 Congress chose to establish what it believed to be a clear and effective test by which new election laws would be measured, in order to insure that the right to vote was not denied or abridged on account of race. Whether that test is characterized as merely mandating an inference of unconstitutional gerrymandering from a plaintiff's failure to prove the absence of discriminatory purpose and effect, or as establishing a new substantive rule forbidding district plans otherwise permissible under the Constitution, Congress' power to enact Section 5 is beyond dispute. *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Whatever may be the functional or substantive relationship between the standards applied in section 5 case and in an ordinary challenge to the constitutionality of a statute, it is the former which apply in the instant case.[20]

[19] United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, p. 345 (1975); Hearings on H.R. 939 Before a Subcommittee of the House Judiciary Committee, 94th Cong., 1st Sess., p. —— (1975) (Remarks of Rep. Rodino).

[20] The resolution of this case does not require a delineation of the precise differences and similarities between these standards. Were this a constitutional challenge to the creation of a multimember district, judicial inquiry might be appropriate into such diverse and troublesome questions as whether blacks had sufficiently distinct interests as to make separate representation important, whether white councilmen had in the past been indifferent to those interests and whether blacks would be better off as a majority of a few districts or a substantial minority of a larger number of districts. *White* v. *Regester*, 412 U.S. 755 (1973). As to minority voters in the states and subdivisions covered by Section 5, Congress, drawing on its unique expertise and experience, has resolved these

Appellants ask this Court to overturn the established construction of Section 5, claiming that it requires "maximization" of black voting strength[21] and urging that the District Court was obligated to approve any districting plan with a "rational basis".[22] The District Court opinion, like section 5, does not require the creation of the maximum feasible number of majority black districts;[23] they merely forbid the systematic dismemberment of black concentrations. Doubtless adherence to this statutory standard will, in the instant case, result in at least two districts with substantial majorities of black voters,[24] but such a consequence is neither undesirable nor unforseen. Insofar as redistricting is concerned, Congress enacted section 5, not to improve the geometric aesthetics of districting maps, but because Congress knew—as did the draftsmen of Plan II—that the consolidation or division of a concentration of black voters would directly effect whether blacks from a majority of one or more districts and whether black candidates can be elected.[25]

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questions in favor of creating districts in which black majorities can elect black candidates. Although circumstances will at times require the courts to determine such difficult political and sociological questions, a congressional resolution is certainly to be welcomed. *Compare Wright* v. *Rockefeller*, 376 U.S. 52, 57-58 (1964), with *Taylor* v. *McKeithen*, 499 F.2d 893 (5th Cir. 1974).

[21] Brief for Appellants, p. 31.

[22] Brief for Appellants, pp. 19-26.

[23] Since blacks are now 38.2% of the voters in New Orleans, it would probably be possible to draw district lines such that 3 out of 5, or 4 out of 7, districts would have black majorities.

[24] See Appendix, p. 626.

[25] Consolidation will also affect the number of votes "diluted." Under Plan II, even treating District B as predominantly black, there are 62,612 black voters in overwhelmingly white districts, compared to only 18,694 white voters in a single marginal black district. Appendix, p. 524. Under the Republican proposal there would be 34,376 black voters in predominantly white districts and 28,384 white voters in predominantly black districts. Appendix, p. 626.

Nothing in Section 5 or its legislative history would require, or even permit, the Attorney General or a district court to approve a voting change merely because it had a "rational" or even "compelling" basis. The statute contains no express or tacit suggestion that the discriminatory purpose or effect of a proposed change can be overcome by a showing of some additional basis or effect of the change, rational, compelling, or otherwise. Nor does the statute distinguish between reapportionment and other voting changes. Few alterations in election laws and procedure, particularly in the area of reapportionment,[26] are so bizarre that some rational basis for them cannot be conjured up by a competent attorney; to require approval of a discriminatory change because there was such a rational basis would render section 5 a dead letter.[27] See *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 462, 467-68 (1972). Once it found that Plan II had the proscribed discriminatory effect, the District Court's inquiry properly came to an end.

In light of the purpose and legislative history of section 5, plaintiffs were required to establish either that there was no concentration of black voters in New Orleans or that any such concentration or concentrations had not been divided among predominantly white districts.

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[26] The various considerations bearing on reapportionment are so diverse, and often inconsistent, as to afford a "basis" for virtually any plan: compactness, continuity, respecting natural and man made banners (which usually run in all directions), creating heterogeneous district to avoid legislators favoring special interests (or creating homogenous districts to achieve the opposite effect), dividing up black communities so they can influence several legislators (or consolidating those communities so they have more control over a smaller number of officials), avoiding "inadequate" representation for a particular group (the choice of group controlling the districting pattern), etc.

[27] This Court rejected a similar contention in *City of Petersburg, Virginia* v. *United States*, 410 U.S. 962 (1973); Jurisdictional Statement in No. 74-865, p. 12.

2. The Effect of Plan II

The District Court correctly concluded that the plaintiffs had failed to establish that Plan II would not dilute the votes of black voters. The court found that black voters were concentrated in a east-west belt running through New Orleans, that that concentration was divided among five different districts and combined with large numbers of white voters, and that bloc voting by whites rendered unlikely if not impossible the election of black candidates from at least four of the districts. These findings of fact were supported by the record, and plaintiffs do not challenge their correctness on appeal.

Racial discrimination in voting was for years prior to the Voting Rights Act a serious problem in Louisiana.[28] When Reconstruction ended in Louisiana there were substantially more blacks registered to vote than whites, but by 1910 blacks accounted for less than the 1% of the state registration.[29] The principle device for limiting the franchise to whites was a literacy test adopted in 1898 for the express purpose of discriminating against blacks.[30] After the Second World War black registration began to rise, a pattern accelerated by this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). In the late 1950's a program of concerted activities was undertaken by the Louisiana Legislature, the State Board of Registration, the State Attorney General and the Association of Citizens Councils of Louisiana to prevent further minority registration and to remove blacks from the existing rolls.[31] A series

[28] See generally Hearings in Louisiana Before the U.S. Commission on Civil Rights (48).

[29] 1961 United States Commission on Civil Rights Report: Voting, pp. 40-41.

[30] See Official Journal of the Constitutional Convention of the State of Louisiana 1898, *passim*.

[31] 1961 United States Commission on Civil Rights Report: Voting, 43-48.

of civil actions prosecuted by the United States failed to bring an end to this active discrimination. See e.g. *United States* v. *McElveen*, 177 F. Supp. 355, 180 F. Supp. 10, 11 (E.D. La. 1960), *aff'd sub nom., United States* v. *Thomas*, 362 U.S. 58 (1960); *United States* v. *Association of Citizens Councils of Louisiana*, 187 F. Supp. 846 (W.D. La. 1960); *United States* v. *Louisiana*, 380 U.S. 145, 148-49 (1965).

The passage of the Voting Rights Act brought a dramatic change in black registration. In 1964 only 28.4% of eligible blacks were registered in New Orleans, accounting for barely 17% of the registered voters.[32] During the following three years over 24,000 blacks registered to vote, raising black registration to 25.1% of the total.[33] By May 1973 34.5% of the registered voters were black.[34] In the year between May 1972 and May 1973 minority registration rose by 2,512, while white registration actually declined by 4,895.[35] As of October, 1974, 38.2% of those voters were black.[36] New Orleans thus presents precisely the situation in which Congress feared district lines would be drawn so as to divide concentrations of black voters and thus dilute the value of their vote.

The District Court correctly determined that the black community was concentrated in the manner with which Congress was concerned.

Although some black families are to be found in most of the principal areas of New Orleans, there is no

[32] 1961 United States Commission on Civil Rights Report: Voting, p. 267.

[33] Political Participation, A Report of the United States Commission on Civil Rights (1968), p. 241.

[34] Appendix, p. 623.

[35] *Compare id.* 622 *with id.* 623.

[36] United States Commission on Civil Rights, The Voting Rights Act: Ten Years After, p. 368.

> general geographical blending of black and white residences. The black population is heavily concentrated in a series of neighborhoods extending eastwardly and westwardly through the central part of the City; the areas lying north and south of this belt, with minor exceptions, are overwhelmingly white.[37]

Plaintiffs do not question the correctness of this finding, which is fully supported by the record. The vast majority of black voters live in a belt approximately a mile wide running the length of the city from east to west; one can traverse the city from St. Jefferson Parish eight miles to St. Bernard Parish without crossing more than one or two white precincts.[38] This black concentration is separated from the predominantly white parts of New Orleans by a variety of man made barriers, including interstate highways,[39] limited access highways,[40] divided multi-lane main

[37] Jurisdictional Statement, p. 4a.

[38] See Appendix, p. 620. This map, based on 1971 figures substantially understates the size of the minority vote, Blacks constituted approximately 31% of the registered voters in 1971, compared to 38.2% of the voters in October, 1974.

[39] Interstate 10 separates the black Desire section (Ward 9, precincts 28, 28-A, 28-B, 28-C) from the white neighborhood to the north (Ward 9, precincts 29, 29-A, 30, 30-A, 31, 31-A), and the black portions of the central city (Ward 2, precincts 6, 6-A, 7; Ward 17, precincts 14 and 16) from the white neighborhood to the north (Ward 3, precincts 12, 15, 16, 18, 19, 20); Interstate 610 separates the black community east of Dillard University (Ward 7, precincts 27, 27-A, 27-B) from the white neighborhood north of the Fairgrounds Race Track (Ward 7, precincts 18 and 19).

[40] The Pontchartrain Parkway, U.S. 9, separates the black central city (Ward 2, precincts 1, 2, 3, 4) from the downtown business area (Ward 3, precinct 1).

thoroughfares,[41] cemeteries,[42] the Inner Harbor Canal[43] and City Park.[44] There are virtually no black voters in certain white parts of the city, including the northern third of the city[45] and the neighborhoods surrounding Loyola and Tulane Universities.[46]

The effect of Plan II, as Plan I before it, was to systematically dismember this concentration of black votes and to place fragments in each of 5 separate districts with larger

[41] St. Claude Avenue separates the black areas to the north (Ward 9, precincts 2, 3, 3-A, 3-B, 4, 5, 5-A, 6, 6-A, 6-B, 8, 22, 23, 24, 25, 25-A, 26, 27) from the white river front (Ward 9, precincts 1, 1-A, 7, 9, 11, 12, 13, 14, 15, 16); Florida Avenue separates those same black areas from the white community north of the Avenue and east of the Intercoastal Waterway (Ward 9, precinct 32), and falls between the black southern portions of Wards 7 and 8 (Ward 7, precinct 8, 9, 9-A, 20, 20-A, 21; Ward 8, precincts 11 and 12) and the white portions of those wards to the north; St. Charles Avenue separates the black central city (Ward 1, precincts 5, 6, 7; Ward 10, precincts 10-H; Ward 11, precincts 10-19; Ward 12, precincts 11, 12, 13) from the white riverfront area to the south (Ward 1, precincts 1-4; Ward 10, precincts 1-9; Ward 11, precincts 1-9, Ward 12, precincts 1-8.)

[42] The Metairie and Greenwood Cemeteries separate the black neighborhood to the south (Ward 17, precincts 13, 13-A, 14, 15, 16) from the white neighborhoods to the north (Ward 17, precincts 18-21).

[43] The Canal separates the black Desire section (Ward 9, precincts 28, 28-A, 28-B, 28-C) from the white area to the east (Ward 9, precinct 32) and separates the black development at Pontchartrain Park (Ward 9, precincts 31-B, 31-C, 31-D and 31-E) from the white area to the east (Ward 9, precincts 33, 42, 42.)

[44] The Park separates the black community near Dillard University (Ward 7, precincts 27-A, 27-B, 26-A, 27, 28, 28-A) from the white portions of Ward 5 across the Park.

[45] Excepting small black communities near Dillard University, a predominantly black college, and near Pontchartrain Park, until recent times the park used by blacks who were excluded because of their race from City Park.

[46] The Director of the City Council Staff which prepared Plan II acknowledged the existence of these black and white concentrations. Appendix, p. 238.

numbers of whites. The black neighborhood north west of the French Quarter immediately adjoins even larger black areas to the east and west; in District C, however, that neighborhood is paired with the all-white neighborhoods of Lake Vista, 5 miles to the north across City Park, and Aurora Gardens, 5 miles to the south across the Mississippi River. The black voters in the southern portions of wards 7 and 8 are combined, not with their black neighbors in Wards 6 and 9, but with the white residential area on the shore of Lake Pontchartrain 3 miles to the north. The black community concentrated between Florida and St. Claude Avenues is divided betwen Districts D and E, each of which has a larger number of white voters. The black community along the Jefferson Parish line is separated from the nearby central city neighborhoods, and combined instead with white West End area miles to the north and the Tulane area miles to the south.[47] With one exception, the districts are long and thin, crossing natural and man-made boundaries to pair fragments of black concentration with larger but distant white areas; District C is a mile wide and 12 miles long.

Had the district lines been drawn to reflect the natural and man-made boundaries which separate the black concentration from the rest of the city, or had the districts merely been reasonably compact, two or more districts with a substantial majority of black voters would have resulted. The Republican plan, for example, resulted in two districts with black majorities in excess of 60%.[48] Instead, Plan II carefully divided that black community among the five city council districts, none receiving more than 21,000 or less than 11,000 minority voters. Thus, the 83,588 black voters concentrated in the center of New Orleans were divided so

[47] See Appendix, p. 638.

[48] Appendix, p. 626.

that—at the time Plan II was drawn up—every district had a white majority. After the preparation of Plan II, and before the decision below, a significant rise in black registration raised the number of black voters in District B to 52.6%.[49] The next largest concentration of black voters is in District E, which not coincidentally has the fastest growing white population in the city.[50] Given the obstacles posed by the high concentration of black voters and the geography of New Orleans, it would be difficult to design a districting plan better suited to avoiding a substantial black majority in any one district and thus preventing the election of a black candidate.[51]

The District Court correctly concluded that the diluting effect of Plan II was aggravated by a history of bloc voting substantially along racial lines.[52] Three of the plaintiff councilmen conceded there was such bloc voting in New Orleans,[53] and two of defendants' witnesses confirmed the existence of this problem.[54] Although a black candidate

[49] Appendix, p. 624. Plan II was prepared in 1972 while Plan I was still under consideration by the Attorney General. *Id.*, pp. 350-51. Between May, 1972 and May, 1973, black registration rose from 79,213 to 83,588, an increase of 5.5%. But for this increase blacks would have constituted only 49.8% of District B.

[50] Appendix, p. 187.

[51] The effect of Plan I may have been slightly worse, but this was accomplished by making 3 of the 5 districts non-continuous. Appendix, p. 623.

Plaintiffs do not deny that it would be entirely feasible to fashion a compact districting plan that did not divide the black community among white districts. Nor does such a claim appear to have been raised in any of the other 50 cases in which the Attorney General objected to a redistricting plan. The existence of a concentration of black voters guarantees *ipso facto* that a non-dilutive districting plan can be drawn which is compact, contiguous, and consistent with *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

[52] Jurisdictional Statement, pp. 18a-19a.

[53] Appendix, pp. 260, 506-07, 545-46, 548.

[54] *Id.*, pp. 414, 547; see also Exhibits 29, 30, 33.

running against several whites in a primary might obtain a plurality in a majority white district, state law requires that the nominee obtain a majority and mandates a second primary where necessary. La. Rev. Stat., Art. 18, § 358 (1966 Supp.). On several occasions blacks have won such pluralities, only to lose the runoff election to a white candidate due to white bloc voting.[55] Although the Democratic nomination is usually tantamount to election, on at least one occasion a black Democratic candidate so nominated was defeated when white traditionally Democratic wards voted in favor of a white Republican. Until restrained from doing so by this Court, Louisiana in the past encouraged such bloc voting by printing on the ballot the race of each candidate. *Anderson* v. *Martin*, 375 U.S. 399 (1964).

Plaintiffs object that, in considering whether Plan II had a discriminatory effect, the District Court was obligated to ignore the fact that 2 of the 7 Council members were to be chosen through an at-large election which, particularly in view of the majority runoff and anti-single shot laws, guaranteed the defeat of any black candidate.[56] They also suggest that, in assessing the impact of Plan II, the District Court should have disregarded the "social, economic and political context" in which it operated.[57] The effect of a proposed statute, however, cannot be assessed in the abstract; it depends on the particular circumstances, legal and otherwise, in which it is applied. The Assistant Attorney General advised Congress in 1970 that any judgment on boundary changes would require demographic or other

[55] Appendix, pp. 501, 564-6, 569; Jurisdictional Statement, pp. 19a, 64a; see also *Anderson* v. *Martin*, 375 U.S. 399, 401 (1964).

[56] Brief for Appellants, pp. 10-12.

[57] Brief for Appellants, p. 16.

information.[58] A similar argument was rejected by this Court in *City of Petersburg* v. *United States*, 410 U.S. 962 (1973)[59] and *United States* v. *Georgia*, 411 U.S. 526 (1973).[60] The Attorney General's regulations regarding Section 5 submissions have long required the submission of extensive information on the background and impact of any submission, especially when redistricting is involved. 28 C.F.R. § 51.10. The District Court, by detailing the legal and factual context which led it to reject Plan II, provided guidance to the City Council in fashioning a method of electing the Council which would be consistent with section 5.[61]

The Fifteenth Amendment does not require that every racial minority must in all cases be represented by a proportionate number of councilmen or legislators. But neither does the Constitution afford any protection to a districting plan well calculated to prevent minority repre-

[58] Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on Bills to Amend the Voting Rights Act, 91st Cong., 1st and 2nd Sess., p. 507 (1969-70).

[59] The City, which wished to annex a predominantly white suburb, unsuccessfully urged that the District Court which disapproved that annexation under section 5 had erred when it took into consideration the fact that the Petersburg City Council was chosen at large. Jurisdictional Statement, No. 74-865, pp. 13 et seq.

[60] Georgia urged that the Attorney General had erred when, in assessing the effect of its reapportionment plan, he considered the impact of the state's multimember district and majority runoff laws. See Brief for Appellants, No. 72-75, pp. 25-30. This Court held that the Attorney General's inquiry was so limited, "Section 5 is not concerned with a simple inventory of voting procedures, but rather with the realty of changed practices as they affect Negro voters." 411 U.S. at 531.

[61] In *City of Petersburg, supra*, the District Court advised the plaintiffs that the annexation, though discriminatory under the then existing circumstances, would pass muster under section 5 if the at-large method of election were replaced by districts. 354 F.Supp. 1021, 1031 (D.D.C., 1972), *aff'd* 410 U.S. 962 (1973).

sentation, or to insure no more than token representation in a city where blacks are close to a majority of the population. In the instant case, although blacks constituted 45.0% of the population and 38.2% of the registered voters, section 5 could not assure that ordinary "political defeat at the polls" would not prevent the election of a substantial number of blacks to the New Orleans City Council. *Whitcomb* v. *Chavis*, 403 U.S. 124, 153 (1971). Plan II, however, as the District Court noted, did more than subject black candidates to the everyday risks of the political process; it harnessed the established pattern of white bloc voting to create an insurmountable obstacle to the election of more than a single black.

II.

Plaintiffs Failed to Prove That Plan II Did Not Have the Purpose of Denying or Abridging the Right to Vote on Account of Race.

Section 5 requires plaintiffs to establish not only that Plan II would not have a discriminatory effect, but also that it did not have a discriminatory purpose. In the instant case the District Court did not reach the latter issue, since it ruled for defendants on the former.[62] It is clear, however, that plaintiffs failed to meet their burden of proof with regard to the purpose of Plan II. This failure affords an alternative ground for affirming the decision of the District Court.

Plan II was not the first districting proposal submitted by the City Council. On March 2, 1972 the Council adopted Ordinance 4796, (hereinafter referred to as "Plan I"), providing for the redistricting of the New Orleans City

[62] Jurisdictional Statement, pp. 40a-42a.

Council. On January 15, 1973, the Attorney General objected to Plan I. In his letter of that date, the Assistant Attorney General spelled out the basis for the objection so as to make clear what steps were needed to fashion a non-discriminatory plan:

> Our analysis shows that the district boundary lines in the submitted plan are drawn in a manner which appears to dilute black voting strength by combining a number of black voters with a larger number of white voters in each of the five districts.[63]

Plaintiffs do not question the correctness of the Attorney General's decision regarding Plan I. Four months after the rejection of Plan I the City Council, on May 13, 1973, adopted Plan II. The controlling question is whether, as plaintiffs claim, Plan II represented a good faith attempt to remedy the defects in Plan I.

The most striking evidence in this regard is that Plan II did not alter in any significant way the defects in Plan I. The boundaries of Districts D and E were identical in both plans.[64] The total number of black voters in District B rose from 20,012 to 20,976, an increase of 964, but much of this change was attributable to the increase in minority registration between 1972 and 1973.[65] White registration in District B fell, but this too was due in large measure to a decline in white registration in City as a whole. The only significant effect of Plan II, outside of the Algiers area, was to move District B to the northeast, adding to it several thousand black voters in Wards 2 and 3 and removing from it an almost equal number in Ward 13. This

[63] Appendix, p. 29.

[64] Compare Appendix, p. 27 *with* p. 31.

[65] Appendix, pp. 623-624. The total number of registered blacks in Districts A, B and C rose from 44,253 on May 4, 1972 to 45,546 on May 9, 1973, an increase of 1,023.

worked a net transfer of approximately 1,000 black voters from District C to District A, a change of no practical significance since both districts remained at least 75% white. In Plan II blacks continued to be divided among the five districts, and in virtually the same proportions as before.[66] The dilution worked by Plan I was carried forward virtually unchanged by Plan II.

The reason why Plan II failed to remedy the defects noted by the Attorney General is also clear from the record. The member of the Council staff who prepared Plan II conceded that plan had been drawn up *before* Plan I was rejected,[67] and the Director of the Council staff testified that in preparing Plan II it was the staff's desire to leave "undisturbed the general racial composition of the districts".[68] The bill containing Plan II recites that it was introduced by one of the councilmen on December 7, 1972, a month prior to the Attorney General's decision. Plan II was drawn up by the Council staff, not as a result of the Attorney General's decision, but because of complaints from the residents of the predominantly white Algiers section, who objected to being divided among three different council districts and paired in part with District A, whose residents had a conflicting attitude regarding proposals for a new bridge across the Mississippi.[69] The changes worked by Plan II on the borders of Districts A, B and C were "a result of" the decision to consolidate the fragments of Algiers and place them in District C,[70] not of any desire to remedy the defects of Plan I.

[66] The proportion of New Orleans' black voters in each of the districts under Plans I and II was as follows:

	Plan I	*Plan II*
District A	14.59%	15.50%
District B	25.26%	25.09%
District C	16.01%	13.88%
District D	21.24%	21.89%
District E	22.89%	23.71%

[67] Appendix, pp. 350-51, 354.

[68] *Id.*, p. 213.

[69] *Id.*, pp. 112, 197.

[70] *Id.*, p. 223.

The reasons why the Council put forward Plan II, which it must have known to be inadequate, rather than attempting to draw up a new non-discriminatory plan, are not hard to devine. The councilmen who voted for Plan II had more than a casual interest in preventing the election of blacks, for any such election would cost one of the incumbents his seat. The potential for abuse inherent in this situation was compounded by the fact that each councilman drew the lines of his own district in consultation with the incumbent in the neighboring district.[71] Although at-large Councilman Moreau, the ostensible author of both plans, insisted he took no interest in the racial composition of the districts,[72] the councilmen whose districts were at stake asked for and were given racial breakdowns on the various options before the plans were finally drafted.[73]

Over and above the danger of defeat by a black candidate, there was another reason why the Council was unwilling to take the steps necessary to remedy the defects in Plan I. With a single exception, all the members of the Council lived in the white lake-front area in the north end of the city.[74] Any meaningful solution to the failings of Plan I would have required the council districts to run from east

[71] *Id.*, p. 339.

[72] *Id.*, pp. 269-279.

[73] *Id.*, pp. 144-45, 208, 339.

[74] *Id.*, pp. 125, 232, 235.

to west rather than north to south, which would have placed several incumbent councilmen in the same lake-front district. Despite some equivocation by plaintiffs' witnesses, it was clear that the Council had no intention of considering a plan that placed incumbents in the same district, and that th Council staff so understood.[75]

Nor is there any suggestion in the record that the Council or its staff did not understand that federal law forbade fragmentation of the black community so as to dilute minority voting strength. The record is replete with evidence that they fully comprehended what was required of them.[76] The lame excuses offered for their failure to do so are unpersuasive.[77] The conclusion is inescapable that the members of the City Council failed to remedy the defects in Plan I, not through inadvertance, nor through blind adherence to any lofty neutral principles, but because they were unwilling to give up the practical political benefits conferred on them by continued dilution of black voting strength.

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[75] *Id.*, pp. 120-21, 146, 148-50, 152, 192, 214, 229, 230, 232, 235, 297, 337, 344, 547, 571, 575, 580.

[76] *Id.*, pp. 176, 195, 206, 245, 263, 265, 333, 352, 541.

[77] One witness said the north-south districts were fashioned to conform to the natural boundaries of the city, but virtually all the boundaries he listed served not as the boundaries of the districts but as internal barriers. *Id.* p. 185-87. Several witnesses insisted it would be impossible to draw east-west districts without disrupting existing precincts, *id.* pp. 187, 200, 326, 514, but in view of the fact there were over 400 precincts it was conceded that the only east-west plan proposed had not had this effect. *Id.* pp. 199, 575.

CONCLUSION

For the above reasons the judgment of the District Court should be affirmed.

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